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nied. He entered a plea of not guilty. [Cl. Tr. p. 7.] Petitioner and all counsel waived a jury trial. [Cl. Tr. p. 10.] Petitioner was found guilty as charged. [Cl. Tr. p. 22.] He was placed on probation for five years on the condition that he spend the first year in the custody of the sheriff and pay a fine of $2,000 plus $200 penalty assessment. [Cl. Tr. p. 23.] Petitioner filed a notice of appeal. [Cl. Tr. p. 4.] His conviction was affirmed by the District Court of Appeal, Fourth Appellate District, State of California. He filed a petition for hearing in the California Supreme Court which was denied.

Statement of the Facts.

"Rhea became ill on January 25, 1963.[1] During the first part of her illness the defendant contacted a medical doctor concerning such by telephone, but refused to follow this doctor's advice because it did not conform to his belief that the administration of drugs was not a proper method to cure an illness. At this time he subjected his daughter to a fast, depriving her of all food and permitting consumption of only water. Thereafter he consulted a chiropractor, because the latter was a drugless practitioner, who advised him against the fast and, on two occasions, impressed upon him the seriousness of the illness from which his daughter was suffering, stating that she had a deep-seated infection. Although the defendant claims that following this ad-

[1]Rhea was petitioner's seven year old daughter. It was her death that resulted in his conviction of involuntary manslaughter.

vice he placed his daughter on a conventional diet, during which time her condition became worse, the evidence supports the inference that he maintained the strict fast imposed upon his daughter at all times from the beginning of her illness until the day before her death, a period of 43 days, with the exception that for a short period she was given juices. During this time the daughter's temperature was abnormally high, and for the greater part thereof ranged from 101° to 105°. At the time of her death she weighed 34 pounds, whereas the normal weight of such a girl would have been 54 pounds. Her condition was described as 'skin and bones'. During her illness the defendant claimed that his daughter was suffering from a heart condition, and after her death he persisted in this contention even though the autopsy on her body indicated no heart defect. On the other hand, in the early stages of his daughter's illness the defendant told a co-worker that she was suffering from rheumatic fever complicated by pneumonia, which supports the conclusion that he had knowledge of the illness which eventually was the immediate cause of his daughter's death. Subsequent to defendant's initial consultation with a medical doctor, a co-worker suggested, on several occasions, that he should seek the advice of a medical doctor but he refused to follow these suggestions. Instead, he told this co-worker that he might lose his daughter but that he was used to tragedy and that this, i.e., the fasting he had imposed upon his daughter, was the only way.

Prior to the time his daughter became ill the defendant had expressed the wish to fast his daughter for 30 days. On one occasion defendant told a co-worker that his mother had told him he was starving his child to death. After her death he expressed the hope that he might have another child because the next time he would prove he was right."[2]

Questions Presented.

Petitioner has attempted to invoke the jurisdiction of this Court upon two distinct grounds. First, he contends that he was deprived of his right to counsel during his conversations with Deputy Sheriff Bender. Second, he contends that his conviction of the crime of involuntary manslaughter finds no support in the evidence and therefore, that his conviction constitutes a denial of due process.

We disagree with both contentions and assert that none of petitioner's rights guaranteed under the United States Constitution were violated by the State of California.

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[2]Our Statement of Facts has been extracted verbatim from the opinion of the District Court of Appeal, Fourth Appellate District, State of California, which is reprinted in Appendix B of the petition for writ of certiorari. Petitioner nowhere asserts that the foregoing statement contained in the appellate court's opinion is inaccurate and indeed, it is clearly an accurate representation of the significant facts in this case.

ARGUMENT.

Petitioner's Case Does Not Present a Federal Constitutional Issue.

A. Petitioner's Right to Counsel Was Not Violated During the Several Conversations With the Sheriff of San Diego County.

Petitioner asserts that his right to counsel was violated during his four conversations with the Sheriff of San Diego County. (Pet. pp. 6-13.) We disagree. While citing a number of cases in support of this contention, it appears that petitioner places chief reliance upon the holdings set forth in *Escobedo v. Illinois,* 378 U.S. 478 (1964) and *Massiah v. U. S.,* 377 U.S. 201 (1964).

Before turning to the rules of law enunciated in those cases, we shall set forth certain significant details concerning the four conversations petitioner had with Deputy Sheriff Bender. The first conversation took place on April 1, 1963, at the Sheriff's Office. Prior to the conversation, Bender telephoned petitioner telling him that he wanted to talk to him about the death of his daughter. Petitioner agreed to talk with Bender. [Rep. Tr. pp. 356-357, 360.] During the interview, Bender told petitioner that he was not familiar with the situation and background of the case. He said that he had received calls and that it was his job to check "these things out." [Rep. Tr. pp. 365-368.]

Petitioner told Bender that he would type a log from notes he had made during his daughter's illness. A sec-

ond conversation took place on April 3, 1963, at the Sheriff's Office when petitioner voluntarily came there to give the log to Bender. [Rep. Tr. pp. 407-408.]

During the second conversation, Bender told petitioner that he was conducting an investigation. He added that he did not know whether a complaint would be filed since that decision would be up to someone else and would be made after Bender gathered all the information. [Rep. Tr. p. 432.] *Bender asked petitioner if he had been in touch with his attorney. Petitioner said that he had and that his attorney could not see any harm in cooperating.* (Apparently petitioner had read part of the log he had made to his attorney before coming to see Bender.) [Rep. Tr. p. 417.]

On April 25, 1963, Bender telephoned petitioner and talked with him. [Rep. Tr. pp. 441-442.] The fourth and final conversation took place by telephone between Bender and petitioner on May 3, 1963. [Rep. Tr. pp. 442-443.]

We shall now turn to the significant cases in this area of the law. In *Escobedo v. Illinois, supra,* 378 U.S. 478, 490-491, this Court held:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the

> accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

It is readily apparent that two of the four factors set forth in *Escobedo* are not present in the instant case. First, petitioner was not in custody at anytime during his four conversations with Bender. The California Supreme Court recently noted that custody is an essential element of the accusatory stage. ". . . The dangers that *Escobedo* and *Dorado* (*People v. Dorado,* 62 Cal. 2d 338, 398 P. 2d 361 (1965)) sought to deter, such as coercion, can only take place if a suspect is in custody." *Ballard v. Superior Court,* 64 A.C. 165, 176, 410 P. 2d 838, 844 (1966). The Delaware Supreme Court has been unable to find a single case in which the *Escobedo* rule has been applied to a pre-arrest confession or admission. *King v. State,* .... Del. ...., 212 A. 2d 722, 725 (1965).

Obviously, petitioner was not in custody during his last two conversations with Bender which took place over the telephone. There is nothing in the record that can possibly suggest that petitioner was not free to leave at anytime during his two in person conversations with Deputy Sheriff Bender. He was, therefore, not in custody during those conversations.

Second, the instant fact situation does not fit the holding in *Escobedo* because Deputy Sheriff Bender was conducting a general inquiry into an unsolved

crime. The purpose of Bender's inquiry was to determine if a crime had been committed, not to accuse petitioner of a crime that the Sheriff had previously concluded had been committed. Indeed, petitioner was not even indicted until October 1, 1963, some six months after the last conversation on May 3, 1963. [Cl. Tr. p. 1.]

Massiah v. U. S., supra, 377 U.S. 201 (1964), is of no assistance to petitioner. There, after the accusatory stage had been reached, an agent of the government tricked the suspect into incriminating himself after he had been indicted. In the instant matter, the accusatory stage had not been reached at the time petitioner talked with Deputy Sheriff Bender. Nor was petitioner unaware that he was talking with the police as was the case in *Massiah.*

Petitioner claims that he did not waive the constitutional rules set forth in *Escobedo* and *Massiah* by informing Deputy Sheriff Bender during their second conversation that he had been in touch with an attorney and that his attorney could not see any harm in cooperating. It is submitted that petitioner's situation because of that statement is significantly different than that of Escobedo who demanded the opportunity to see counsel but was not permitted to do so. Conceivably, had Escobedo been permitted to converse with his attorney he might have refused to say anything to the police.

But here petitioner was not refused the right to talk with his attorney. To the contrary, he exercised that right and voluntarily decided to cooperate with the Sheriff. ". . . It is inconceivable that, having conferred with

his own attorney prior to the interrogation, he was uninformed with respect to his right to remain silent. . . ." *Wade v. Yeager,* 245 F. Supp. 67, 73 (D.N.J. 1965). What more can possibly be required in order to conclude that a person waived his right to counsel and right to remain silent? We would answer that nothing more should be required.

We do not contend that petitioner by consulting with an attorney after his first interview with Bender waived his right to counsel during that interview. However, that interview was clearly during the investigatory stage. The significance of petitioner's consultation with counsel is that whether or not the accusatory stage had been reached at some point after the first interview petitioner clearly waived his right to counsel and right to remain silent as those rights apply to all interviews after the first.

It is note worthy that petitioner did not ask for counsel as was the case in *Escobedo.* Nothing more need be said on that point since the application of the *Escobedo* doctrine to such a fact situation is already before this court in several other cases.

In final analysis, petitioner is asking that the Court extend *Escobedo* so that the police would be required to warn everyone talked with of his right to counsel and right to remain silent. Such was not the intent of the *Escobedo* decision for this Court stated:

> "Nothing we have said today affects the powers of the police to investigate *'an unsolved crime,'* [citation omitted] by gathering information from witnesses and by other 'proper investigative efforts.' [citation omitted] We hold only that when the process shifts from investigatory to accusatory —when its focus is on the accused and its purpose

> is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." (at p. 492.) (Emphasis added.)

As the California Supreme Court noted in *People v. Dorado, supra,* 62 Cal. 2d 338, 354, 398 P. 2d 361, 371 (1965):

> " 'So long as the methods used comply with due process standards, it is in the public interest for the police to encourage confessions and admissions during interrogations.' "

Clearly, the methods used in this case complied with due process standards.

B. Petitioner Starved His Daughter to Death so That He Could Prove That Fasting Was a Cure for Illness; the Fact Situation in This Case Clearly Demonstrates That Petitioner Committed the Crime of Involuntary Manslaughter.

Petitioner asserts that this case raises ". . . 'fundamental questions as to the rights of citizens and of a parent to minister unto himself and to his children as he believes best.' " (Pet. p. 13.)

That contention is nothing more than a smoke screen to coverup the horrendous crime that he committed upon his defenseless daughter. What the evidence clearly shows is that petitioner starved his daughter to death over a 43 day period so that he could prove that fasting was a cure for illness. The evidence more than justifies the conclusion reached by the District Court of Appeal, Fourth Appellate District, that petitioner while understanding all the risks including that of death knowingly

experimented with his daughter's life. (Pet. App. B, p. 8a.)

On appeal the evidence will not be reweighed and will be viewed in the light most favorable to the prosecution. *Spindler v. U. S.*, 336 F. 2d 678, 682 (9th Cir. 1964), cert. den., *Richards v. U. S.*, 380 U.S. 909 (1965); *People v. Newland*, 15 Cal. 2d 678, 681, 104 P. 2d 778, 779-780 (1940).

Even if it be assumed that petitioner acted in good faith, his conviction of the crime of involuntary manslaughter does not violate due process. Assume arguendo that petitioner held a good faith belief that prayer would cure all the ills of the body; that he secured the services of a religious practitioner who prayed for his daughter's recovery and as a result she died. The authorities are almost unanimous in concluding that such action even if grounded on the First Amendment to the United States Constitution would constitute a crime. In particular see:

Reynolds v. United States, 98 U.S. 145 (1878);

State v. Cox, 138 Me. 151, 23 A. 2d 634 (1941);

People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903);

Owens v. State, 60 Okla. Crim. 110, 116 Pac. 345 (1911);

26 Am. Jur., *Homicide*, § 108, pp. 229-230 (1940);

10 A.L.R. 1137, 1150 (1921);

Ann. Cas. 1913 (B) p. 1221 *et seq.*;

22 C.J.S., *Criminal Law*, § 51, p. 188 (1961).

Petitioner's right to believe in fasting as the means of curing all ills of the body is absolute. His right to

act is not absolute. *Cf., Gospel Army v. City of Los Angeles,* 27 Cal. 2d 232, 242, 163 P. 2d 704, 711 (1945), *appeal dismissed,* 331 U.S. 843 (1947). In that case the court went on to note that society has an interest in protecting the welfare of children—to protect them from abuse. Neither rights of parenthood or religion are beyond limitation. 27 Cal. 2d at p. 244, 163 P. 2d at p. 712.

Conclusion.

We do not believe that any rights guaranteed to petitioner by the United States Constitution were violated by the State of California. The record in this case clearly shows that petitioner's right to counsel was not violated. The record further shows that petitioner by experimenting with his preconceived notion that fasting is the cure for all ills of the body starved his seven year old daughter to her death; that there is sufficient evidence from which the trial court could have concluded that petitioner was guilty of involuntary manslaughter. Therefore, it is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General,
WILLIAM E. JAMES,
Assistant Attorney General,
WILLIAM L. ZESSAR,
Deputy Attorney General,
Attorneys for Respondent.